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Criminal Law -- Quashing Indictment for Incompetent Evidence Before Grand Jury

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Suppose a defendant has killed three persons by rapidly successive shots, and pleads acquittal for *A's* murder in defense of that of *C*.[15] Proof of the missiles striking each of the three would be entirely different, thus three indictments would lie on the "same evidence" rule.[16] The act in relation to one of the three was no "essential" part of the act in relation to another, hence three indictments lie on the "essential element" rule. Conceding three transactions to have taken place, each shot constituting one, the question arises as to what would be the situation where one shot kills three persons. Some courts have carried the "same transaction" test to its logical conclusion and would, on a basis of previous decisions, sustain but one indictment.[17]

The "same transaction" test then is flexible, leaving to the court the definition of a single transaction. But the other tests are also flexible, changing with application. From a practical standpoint the courts in effect reach the same conclusions on any of the tests, with the possible exception, as noted, of the "same transaction" test, where several offenses grow out of the same act.

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Criminal Law—Quashing Indictment for Incompetent Evidence Before Grand July.

The defendant moved to quash his indictment on the ground that all the evidence (testimony of two witnesses) heard by the grand jury was hearsay and incompetent. Motion denied, and, in affirming, the Supreme Court *held:* There is a distinction to be made between in-

kill him, and by reason of bad marksmanship struck and killed *B*, whom he did not intend to kill, the transaction, the assault with intent to kill *A* and the actual murder of *B* are legally the same." Powell, J., in Burnam v. State, 2 Ga. App. 395, 58 S. E. 683 (1907); Gunter v. State, 111 Ala. 23, 20 So. 632 (1896) (the court draws the distinction here between a situation where two shots are fired and where only one occurs); Hurst v. State, 86 Ala. 604, 6 So. 120 (1889); Clem v. State, 42 Ind. 420 (1873).

[15] State v. Corbett, 117 S. C. 356, 109 S. E. 133, 20 A. L. R. 328 (1921).

[16] The court's decision rested on an application of the "same evidence" test, it being held that a different proof was necessary in the case of each murder.

[17] The following cases represent the development of the rule in Georgia: Roberts v. State, 14 Ga. 8 (1853); Holt v. State, 38 Ga. 187 (1868); Knight v. State, 73 Ga. 804 (1884); Lock v. State, 122 Ga. 730, 50 S. E. 932 (1905); Burnam v. State, *supra* note 14; see 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §1054. It appears in Lillie v. State, 79 Tex. Crim. Rep. 615 at 616, 187 S. W. 482 at 483 (1916), that in the opinion of the court, if two persons are killed or injured by the same shot, a conviction of the murder or assault of one of them would be a bar to a subsequent prosecution for the murder or assault of the other. The cases of Sadberry v. State, 39 Tex. Crim. Rep. 466 46 S. W. 639 (1898); and Wright v. State, 17 Tex. App. 152 (1884), would sustain but one conviction on a plea of *autrefois convict.*

competent evidence and disqualified witnesses as ground for a motion to quash. Only in the latter case, and where all of the witnesses before the grand jury were disqualified, should the indictment be quashed.[1]

There are at least three rules with regard to quashal of an indictment on the ground of incompetency or illegality of evidence heard by the grand jury.[2] (1) Some courts hold that an indictment cannot be quashed for this cause unless all of the evidence was incompetent, and, if there was the slightest legal or competent evidence, the court cannot inquire into the matter of its sufficiency.[3] (2) New York admits the total-incompetency test, but adds that in extreme instances the indictment may be quashed also for insufficiency.[4] (3) A rule, which appears to be increasingly favored, is that the court is without power to go behind the indictment to examine the evidence heard, and consequently an indictment can in no case be quashed for incompetency or illegality of evidence.[5] Any other course, it is said, would destroy the secrecy of proceedings before the grand jury; moreover, the grand jury is an inquisitorial body, its finding is not final, and all illegal evidence will be excluded on the trial of the case.[6] The latter rule is followed in a number of states where statute provides that none but legal evidence shall be heard.[7] The apparent effect of such statutes is avoided by the desirable but tenuous construction that they are merely directory and do not empower the court to disturb the grand jury's finding.[8]

[1] State v. Levy, 200 N. C. 586, 158 S. E. 94 (1931).

[2] See Note (1924) 31 A. L. R. 1479.

[3] Royce v. Territory, 5 Okla. 61, 47 Pac. 1083 (1897); State v. Logan, 1 Nev. 509 (1865); Estill v. State, 277 P. 256 (Okla. 1929); United States v. Rubin, 218 F. 245 (D. Conn. 1914); People v. Duncan, 261 Ill. 339, 103 N. E. 1043 (1913); State v. Coates, 130 N. C. 701, 41 S. E. 706 (1902).

[4] People v. Sexton, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. Rep. 621 (1907). And see People v. Glen, 173 N. Y. 395, 66 N. E. 112, 115 (1903); People v. Hess, 110 Misc. 76, 179 N. Y. Supp. 734, 739 (1920). Several decisions by the Federal courts have indicated that an indictment found on "utterly insufficient or palpably incompetent" evidence may be quashed, but the prerogative is more sparingly exercised than in New York. McKinney v. United States, 199 Fed. 25 (C. C. A. 8th, 1912); United States v. Silverthorne, 265 Fed. 853 (W. D. N. Y. 1920).

[5] State v. Chance, 29 N. M. 34, 221 Pac. 183, 31 A. L. R. 1466 (1923); People v. Collins, 60 Cal. App. 263, 212 Pac. 701 (1923); Holliman v. State, 108 Tex. Crim. Rep. 92, 299 S. W. 249 (1927); Murphy v. State, 171 Ark. 620, 286 S. W. 871 (1926).

[6] State v. Chance, *supra* note 5.

[7] People v. Fealy, 33 Cal. App. 605, 165 Pac. 1034 (1917); State v. Chance, *supra* note 5; Murphy v. State, *supra* note 5.

[8] Murphy v. State, *supra* note 5.

The purpose of the grand jury is to seek probable cause for trial; its indictment is a formal accusation and in no way a final adjudication against the defendant. On principle, it would seem that rule (3) is the sound one.[9] North Carolina, until the Levy decision, has blandly followed the total-incompetency rule.[10] The language of the principal case manifests an inclination to hold with the modern trend that in no case can the court examine the evidence, but precedent forbade such a course; hence the distinction between disqualified witnesses and incompetent evidence. The writer's investigation has not revealed that a like distinction obtains in any other jurisdiction. The North Carolina court failed to complete its jump toward the liberal view, and appears to have established a rule quite its own.

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Criminal Law—Sufficiency of Indictment Under National Motor Vehicle Theft Act.

The *National Motor Vehicle Theft Act*[1] makes it a crime to sell any motor vehicle moving as, or which is a part of, or which constitutes interstate commerce, knowing the same to have been stolen. In *Grimesly v. U. S.*[2] an indictment, drawn up under this act, charging the sale of a motor vehicle with knowledge that it had been transferred in interstate commerce and theretofore stolen was held insufficient, on the ground that it was not alleged that the automobile was moving in interstate commerce and that it did not further state that the automobile had been stolen.

The Sixth amendment provides, that, "in all criminal prosecutions the accused shall enjoy the right—to be informed of the nature and cause of the accusation. . . ." Congress, in order to limit the courts in testing whether or not the accused has been sufficiently informed,

[9] As to fundamentals of the grand jury system, see 1 WIGMORE, EVIDENCE (2nd ed. 1923) 20.

[10] "When an indictment is found upon testimony, all of which is incompetent, or of witnesses, all of whom are disqualified, the bill will be quashed. But where some of the testimony or some of the witnesses were incompetent, the court will not go into the barren inquiry how far such testimony or witnesses contributed to the finding of the bill," State v. Coates, *supra* note 3. The opinion of the principal case quotes the same extract, and points out that since the Coates case actually concerned only disqualified witnesses the court's statement of the rule to include incompetent evidence was so much too broad. But if it be granted that *all* of the evidence heard by the grand jury in a given case is incompetent, where is a logical basis for the distinction?

[1] 41 Stat. 324 (1919); 18 U. S. C. A. §408 (1927).

[2] 50 F. (2d) 509 (C. C. A. 5th, 1931).